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23 And Proposed Class Counsel

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**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**  
**WESTERN DIVISION**

1 KAMBIZ BATMANGHELICH, on  
2 behalf of himself and all others  
3 similarly situated, and on behalf of the  
4 general public,

5 Plaintiffs,

6 v.

7 SIRIUS XM RADIO, INC., a  
8 Delaware corporation, STREAM  
9 INTERNATIONAL INC., a Delaware  
10 corporation, and DOES 3 through 50,  
11 inclusive,

12 Defendants.

13 **CASE NO.: CV 09-9190 VBF (JCx)**

14 **NOTICE OF MOTION AND**  
15 **UNOPPOSED MOTION FOR**  
16 **PRELIMINARY APPROVAL OF**  
17 **CLASS ACTION SETTLEMENT**

18 **DATE:** November 29, 2010

19 **TIME:** 1:30 P.M.

20 **COURTROOM:** 9

21 **JUDGE:** Hon. Valerie Baker Fairbank

1 **TO THE COURT AND TO ALL PARTIES:**

2 PLEASE TAKE NOTICE that on November 29, 2010 at 1:30 p.m., in  
3 Courtroom 9 of the above-entitled Court, located at 312 N. Spring Street, Los  
4 Angeles, California 90012, Plaintiff Kambiz Batmanghelich will, and hereby does,  
5 move this Court for an order granting preliminary approval of a proposed class  
6 action settlement. The terms of the settlement are contained within the Settlement  
7 Agreement and Release between Plaintiff and Defendants ("Stipulation of  
8 Settlement") filed herewith. This motion is unopposed by Defendants.

9 This motion will be based on this Notice and accompanying Memorandum of  
10 Points and Authorities, the Declarations of Kenneth S. Gaines, Steven L. Miller,  
11 Scott A. Miller, and Daniel F. Gaines, the Stipulation of Settlement (including  
12 exhibits), all filed herewith, and on such further evidence and argument as may be  
13 presented at the hearing.

14 Dated: October 25, 2010

15 Respectfully Submitted,

16 GAINES & GAINES, APLC

18 By: /s/

19 Kenneth S. Gaines, Esq.

20 Daniel F. Gaines, Esq.

21 Attorneys for Plaintiff Kambiz  
22 Batmanghelich and Proposed Class  
23 Counsel

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## California Cases

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1     **I. INTRODUCTION**

2     Plaintiff Kambiz Batmanghelich (“Plaintiff” or “Batmanghelich”) on behalf of  
3     himself and others similarly situated, and Defendants Sirius XM Radio Inc. (“Sirius”)  
4     and Stream International Inc. (“Stream”) (Sirius and Stream are referred to  
5     collectively as “Defendants”; Plaintiff, Sirius, and Stream as the “Parties”) seek  
6     preliminary approval of a proposed class action settlement. Subject to Court  
7     approval, Plaintiff has settled his and class members’ claims against Defendants for a  
8     non-reversionary payment of \$9,480,000.00 (which includes all settlement payments,  
9     the costs of settlement administration, Plaintiffs’ attorneys’ fees and costs, and the  
10    named Plaintiff’s service payment).

11    This proposed settlement (“Settlement”)<sup>1</sup> resolves all of the Named Plaintiffs’  
12    and Settlement Class Members’ claims against Sirius and Stream.

13    The proposed Settlement satisfies all of the criteria for preliminary settlement  
14    approval under Federal law, and is fair, reasonable, and adequate. Accordingly, the  
15    Parties request that the Court:

- 16    1. Provisionally certify the proposed Settlement Class for settlement purposes;
- 17    2. Grant preliminary approval of the proposed Settlement;
- 18    3. Permit the amendment of the Third Amended Complaint on file herein to  
19       conform to the scope of the Settlement;
- 20    4. Approve the proposed notice program and the notice forms and claim forms  
21       proposed by the parties (collectively the “Settlement Documents”);
- 22    5. Confirm the appointment of Plaintiff Kambiz Batmanghelich as Class  
23       Representative;
- 24    6. Confirm the appointment of Kenneth S. Gaines and Daniel F. Gaines of Gaines  
25       & Gaines, APLC, Scott A. Miller of Law Offices of Scott A. Miller, APC,

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<sup>1</sup> The Parties’ Stipulation of Settlement is attached to the Declaration of Kenneth S.  
28    Gaines, submitted herewith, as Exhibit “A.”

1 and Steven L. Miller of Steven L. Miller, APLC as Settlement Class  
2 Counsel;

3 7. Confirm the appointment of The Garden City Group, Inc. as Settlement  
4 Administrator (with the Parties reserving the right to name a new  
5 Administrator by mutual agreement and Court approval);  
6 8. Set deadlines for mailing Settlement Documents and for submitting a claim,  
7 opting out or objecting to the Settlement; and  
8 9. Schedule a final approval hearing.

9 **II. FACTUAL BACKGROUND**

10 On November 10, 2009, Plaintiff filed a Class Action Complaint against Sirius  
11 and various Doe defendants in the Los Angeles Superior Court, which was removed  
12 by Sirius to the United States District Court for the Central District of California  
13 pursuant to the Class Action Fairness Act, 28 U.S.C. § 1441(b) (“CAFA”). In his  
14 Complaint (later amended), Plaintiff alleges Sirius and the Doe defendants  
15 surreptitiously recorded telephone calls between Sirius and its customers (including  
16 Plaintiff), without customers’ knowledge or consent. The original Complaint alleged  
17 various claims stemming from these recordings, including the violation of California  
18 Penal Code, section 630 *et. seq.*, and sought statutory damages pursuant to California  
19 Penal Code section 637.2 of \$5,000 per allegedly unlawful recording. Declaration of  
20 Kenneth S. Gaines in Support of Unopposed Motion for Preliminary Approval of  
21 Class Action Settlement (“Gaines Decl.”) at ¶¶ 7-8.

22 Shortly after removal, Sirius filed a third party claim against Stream, a  
23 company which handled some of Sirius’ call center operations. Stream was also  
24 added as a defendant by Plaintiff. Gaines Decl. at ¶ 9.

25 Stream filed a cross-claim against Sirius; Sirius and Stream have subsequently  
26 dismissed their claims against each other. *Id.*

27 Plaintiff filed the Third Amended Complaint (“TAC”) on April 23, 2010,  
28 asserting claims for invasion of privacy (violations of California Penal Code section

1 630 *et. seq.*) and negligence. In the TAC, Plaintiff seeks statutory damages pursuant  
 2 to Penal Code section 637.2, injunctive relief pursuant to Penal Code 637.2(b), and  
 3 compensatory damages. Gaines Decl. at ¶ 10.

4 Plaintiff engaged in extensive formal and informal discovery, including  
 5 multiple depositions in Los Angeles and Boston, multiple sets of interrogatories,  
 6 requests for admission, and numerous document production requests. Plaintiff's  
 7 counsel has reviewed thousands of documents produced in connection with the  
 8 litigation, engaged in extensive research and inquiry with respect to the claims  
 9 asserted in the Action, and has vigorously litigated the matter on behalf of the class,  
 10 in preparation for a class certification motion and, subsequently, in connection with  
 11 the settlement. Gaines Decl. at ¶¶ 11-13.

12 The facts are clear. Sirius hired Stream to handle some of its call center  
 13 operations; although Defendants recorded customers' calls in many cases, they failed  
 14 to notify customers that their telephone conversations were being recorded. In fact,  
 15 within days of filing suit, Defendants promptly modified their practices and began  
 16 notifying all customers that their telephone calls were being recorded. Gaines Decl.  
 17 at ¶ 12.

18 Plaintiff steadfastly maintained the viability and likely success of his claims on  
 19 a classwide basis, while Defendants proffered numerous defenses to both class  
 20 certification and liability. Following extensive discovery and assessment of the risks  
 21 involved in further litigation, the Parties engaged in pre-certification settlement  
 22 discussions, which included a formal mediation session on May 12, 2010 with the  
 23 Honorable Dickran Tevrizian, United States District Judge, Retired. The mediation  
 24 session did not result in a settlement. Gaines Decl. at ¶ 14.

25 Following further settlement discussions, together with the continued  
 26 participation and recommendations of Judge Tevrizian, on June 14, 2010 an  
 27 agreement in principle was reached regarding the framework for basic settlement  
 28 terms. The Stipulation of Settlement, entered into on October 25, 2010, embodies a

1 comprehensive resolution of all claims encompassed in Plaintiff's TAC (including the  
2 amendment sought by this motion). Gaines Decl. at ¶ 15.

3 **III. SUMMARY OF SETTLEMENT TERMS**

4 A copy of the Settlement Agreement and Release is attached and marked  
5 Exhibit "A" to the Declaration of Kenneth S. Gaines (hereinafter "Stipulation of  
6 Settlement" or "Stip."), submitted herewith. Its significant terms are set forth below.

7 **A. The Settlement Class**

8 The Settlement Class is defined as:

9 All persons in California, Connecticut, Florida, Illinois,  
10 Maryland, Massachusetts, Michigan, Nevada, New  
11 Hampshire, Pennsylvania, Vermont, and Washington (the  
12 "Covered States") who (1) placed one or more telephone  
13 calls to Sirius Satellite Radio between July 13, 2006 and  
14 November 17, 2009, spoke with a representative on behalf  
15 of Sirius Satellite Radio, and were not provided with notice  
16 that the call may be recorded or monitored; and/or (2)  
17 received one or more telephone calls from Sirius Satellite  
18 Radio between July 13, 2006 and February 1, 2010, spoke  
19 with a representative on behalf of Sirius Satellite Radio, and  
20 were not provided with notice that the call may be recorded  
21 or monitored; and/or (3) placed one or more telephone calls  
22 to XM Satellite Radio between January 25, 2009 and  
23 November 17, 2009, to discuss music royalty fees or  
24 canceling their XM Satellite Radio subscription, spoke with  
25 a representative on behalf of XM Satellite Radio, and were  
26 not provided with notice that the call may be recorded or  
27 monitored.

28 Stip. at ¶ 1(f). The Settlement Class includes residents of California in addition  
2 to 11 other states which prohibit the recording of telephone conversations without  
3 notice to, or the consent of, all parties to the conversation ("two-party consent").

4 The scope of the Settlement Class and release reach back to July 13, 2006, the  
5 date on which the California Supreme Court decided *Kearney v. Solomon Smith*  
6 *Barney* (2006) 39 Cal 4th 95 (resolving choice of law issues implicated by Cal. Penal  
7  
8

1 Code section 630 *et. esq.* and concluding that persons located in *any* state must  
2 comply with the California recording notice requirements when they engage in  
3 telephone conversations with California residents, and that liability for statutory  
4 damages would commence going forward).

5 **B. Settlement Consideration**

6 Stream (on its own behalf and on behalf of Sirius) will pay a total of Nine  
7 Million Four Hundred Eighty Thousand Dollars (\$9,480,000.00) to fund the Common  
8 Fund, whose proceeds will compensate Settlement Class Members for their damages,  
9 pay the costs of settlement administration, pay attorneys' fees and costs to Plaintiff's  
10 Counsel, and compensate Plaintiff a service payment for the time and risk he  
11 expended in bringing this litigation. Stip. at ¶ 1(l).

12 **1. Payment to Plaintiff and Class Members**

13 The Settlement Amount, which is the Common Fund less all attorneys' fees  
14 and costs as ordered by the Court, and less all costs of class notice and claims  
15 administration as ordered by the Court, is approximately Seven Million Dollars  
16 (\$7,000,000.00), the entirety of which must be paid out by Defendants. Stip. at ¶  
17 1(u). After subtracting the Plaintiff's service payment, the remaining portion of the  
18 Settlement Amount will be distributed to Class Members who have submitted valid  
19 and timely claims, such that Class Members who reside in California shall be paid  
20 five times the amount to be paid to all other states (recognizing the magnitude of the  
21 statutory damages as provided by Cal. Penal Code section 637.2 as opposed to the  
22 other states' remedies), up to \$5,000 each for California residents and up to \$1,000  
23 each for residents of all other states. Stip. at ¶¶ 3.3-3.5. If less than the entire  
24 Settlement Amount is claimed, or any settlement checks remain uncashed for more  
25 than 120 days, then such funds shall be paid to a *cy pres* recipient to be proposed by  
26 Plaintiff and Class Counsel, subject to the approval of Defendants and the Court.  
27 Stip. at ¶ 11.

1        The Settlement provides that Plaintiff Batmanghelich may request a service  
2 payment of up to \$10,000, subject to the Court's approval, which is intended to  
3 compensate him for 1) his damages recoverable as a result of the claims alleged in the  
4 TAC, and 2) the time, expense, and risk he has expended in bringing this lawsuit for  
5 the benefit of Class Members. Stip. at ¶ 3.6.

6            **2. Payment of Claims Administration Expenses**

7        The parties have selected The Garden City Group, Inc., an experienced and  
8 reputable settlement administrator, to administer the settlement, including the  
9 provision of notice and facilitation of the claims/opt-out process. The cost of  
10 settlement administration is estimated to be no more than \$450,000, which shall be  
11 paid from the Common Fund. If settlement administration expenses are more or less  
12 than \$450,000, the difference shall be added to (or subtracted from) the Settlement  
13 Amount, for distribution to Class Members. Stip. at ¶ 7.

14            **3. Attorneys' Fees and Costs to Class Counsel**

15        The Settlement provides that Plaintiff's counsel may request up to Two Million  
16 Dollars (\$2,000,000) as an award of attorneys' fees, representing approximately 21%  
17 of the total settlement consideration and to be paid from the Common Fund, in  
18 consideration of the time and effort they have expended for the benefit of Plaintiff  
19 and Settlement Class Members. Further, the Settlement provides that Plaintiff's  
20 counsel may request up to \$20,000 in reimbursement of litigation costs actually and  
21 reasonably incurred during the course of this litigation. Any portion of the attorneys'  
22 fees and costs not requested and/or not awarded shall be added to the Settlement  
23 Amount, for distribution to Class Members. Stip. at ¶ 3.7.

24            **4. Non-Monetary Settlement Terms**

25        Without admitting liability, Defendants have agreed to comply with the  
26 requirements of Cal. Penal Code sections 630 *et. seq.*, including providing  
27 notification to their customers when their telephone calls may be recorded. Stip. at ¶  
28 4.

1                   **C. The Release by Plaintiff and Class Members**

2                   The release, to which all Class Members (except for those who submit a valid  
3 and timely request for exclusion) will be bound, is as follows:

4                   “Upon entry of the Judgment, Class Representative, for  
5 himself and on behalf of each member of the Class who has  
6 not submitted a valid and timely request for exclusion from  
7 the Class, and their respective heirs, assigns, successors,  
8 agents, attorneys, executors, and representatives, shall be  
9 deemed to have, and by operation of the Judgment shall  
10 have, fully, finally, irrevocably, and forever released Sirius  
11 XM and Stream and, whether or not specifically named  
12 herein, each of their past or present directors, officers,  
13 employees, agents, insurers or reinsurers, shareholders,  
14 attorneys, advisors, consultants, representatives, partners,  
15 affiliates, related companies, affiliated companies, parents,  
16 subsidiaries, joint venturers, independent contractors,  
17 wholesalers, resellers, distributors, retailers, divisions,  
18 predecessors, successors, and assigns, from any and all  
19 liabilities, claims, causes of action, damages, costs,  
20 attorneys’ fees, losses, or demands, whether known or  
21 unknown, existing or potential, suspected or unsuspected,  
22 which were asserted in the Action or are related to the  
23 claims asserted in the Action, including, without limitation,  
24 any and all claims relating to the transactions, actions,  
25 conduct or events that are the subject of the Action, and any  
26 and all claims arising out of the institution, prosecution,  
27 assertion, settlement or resolution of the Action, and any all  
28 claims relating to the recording and/or monitoring of  
29 telephone calls.”

30                   The release includes a waiver of Cal. Civil Code section 1542 (and any related  
31 statute in the Class Members’ state of residence) with respect to these released  
32 claims. Stip. at ¶ 14.

33                   **IV. PRELIMINARY SETTLEMENT APPROVAL PROCESS**

34                   A class action may not be dismissed, compromised or settled without court  
35 approval. Fed. R. Civ. P. (“FRCP”) 23(e). Judicial proceedings under the Federal  
36 Rules of Civil Procedure have led to a defined procedure and specific criteria for

1 settlement approval in class actions that are thoroughly described in the Manual for  
 2 Complex Litigation (Fourth) (“*Manual* (Fourth)”) § 21.62 (2004). Federal Rule of  
 3 Civil Procedure 23(e) sets forth a “two-step process in which the Court first  
 4 determines whether a proposed class action settlement deserves preliminary approval  
 5 and then, after notice is given to class members, whether final approval is warranted.”  
 6 *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal.  
 7 2004) (citing *Manual for Complex Litigation* (Third) § 30.41 (1995)).

8 Preliminary settlement approval and notice to the proposed class are  
 9 appropriate where “the proposed settlement appears to be the product of serious,  
 10 informed, non-collusive negotiations, has no obvious deficiencies, does not  
 11 improperly grant preferential treatment to class representatives or segments of the  
 12 class, and falls within the range of possible approval.” *In re Tableware Antitrust*  
 13 *Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007) (quoting *Schwartz v. Dallas*  
 14 *Cowboys Football Club, Ltd.*, 157 F. Supp. 2d 561, 570 n. 12 (E.D. Pa. 2001)); *see*  
 15 *also Hanlon v. Chrysler Corp.*, 150 F. 3d 1011, 1027 (9th Cir. 1998) (the court’s task  
 16 is to “balance a number of factors,” including “the risk, expense, complexity, and  
 17 likely duration of further litigation,” “the extent of discovery completed and the stage  
 18 of the proceedings,” and “the amount offered in settlement”). This procedure for  
 19 preliminary approval of settlement agreements, endorsed by the leading class action  
 20 commentator, Professor Newberg, and commonly used by Federal courts, safeguards  
 21 class members’ procedural due process rights and enables a court to fulfill its role as  
 22 the “guardian” of the class. *See* 4 Alba Conte & Herbert B. Newberg, *Newberg on*  
 23 *Class Actions* (“*Newberg*”), § 11.22 (4th ed. 2002).

24 The approval or rejection of the proposed settlement is committed to the  
 25 Court’s sound discretion. *See Class Plaintiffs v. City of Seattle*, 955 F. 2d 1268, 1276  
 26 (9th Cir. 1992) (in the context of a class action settlement, appellate court cannot  
 27 “substitute [its] notions of fairness for those of the [trial] judge and the parties to the  
 28 agreement,” and will reverse only upon a strong showing of abuse of discretion).

1        The Court's preliminary evaluation of the proposed settlement purports to  
 2 determine whether it is within the permissible "range of reasonableness" and thus,  
 3 whether the notice to the class is appropriate. 4 *Newberg* § 11.25-26; Manual for  
 4 Complex Litigation (Third) ("*Manual* (Third)") § 30.41 (1995).

5        **A.    Provisional Certification of the Settlement Class**

6        The Parties request that the Court provisionally certify the proposed Settlement  
 7 Class. Provisional class certification is appropriate at the preliminary approval stage  
 8 where, as here, the proposed settlement class (as defined in the parties' Settlement)  
 9 has not previously been certified by the Court, and the requirements for certification  
 10 are met. 4 *Newberg* § 11.22; *see generally*, Gaines Decl. at ¶¶26-34. Pragmatically,  
 11 provisional class certification facilitates distribution of notice on the terms of the  
 12 proposed settlement and the date and time of the final approval hearing to all  
 13 settlement class members. *See Manual* (Third) § 30.41.

14       The additional rulings sought by this motion – approving the form, content and  
 15 distribution of the Settlement Documents and scheduling a formal fairness hearing –  
 16 facilitate the settlement approval process, and are also traditionally made at this  
 17 preliminary approval stage. 4 *Newberg* § 11.26.

18       **B.    Settlement Administration Timeline**

19       The following schedule sets forth a proposed sequence for the relevant dates  
 20 and deadlines embodied in the Settlement, conditioned upon this Court granting  
 21 preliminary approval of the proposed Settlement. This is outlined in the Proposed  
 22 Order filed herewith. *See Stip.* at ¶ 10.2:

Last day for Stream to deposit \$450,000 with the Claims Administrator for notice expenses	15 days after preliminary approval
Last day for Defendants to provide the settlement administrator with last known addresses and/or e-mail addresses of Class Members	21 days after preliminary approval
Last day for settlement administrator to mail and e-mail notice to Class Members	42 days after preliminary approval
Last day for settlement administrator to begin publishing Short Form Notice in a newspaper in accordance with	45 days after preliminary approval

1	paragraph 6.3 above	
2	Last day for requests for exclusion from the settlement to be postmarked by Class Members	105 days after preliminary approval
3	Last day for Plaintiff to file motion for final approval of settlement and application for attorneys' fees and costs, class representative's service payment, and claims administration expenses	130 days after preliminary approval
6	Last day for Class Members to file objections to the settlement	145 days after preliminary approval
7	Last day for the Parties to reply to any objections filed by Class Members	160 days after preliminary approval
9	Hearing on motion for final approval of settlement and application for attorneys' fees and costs, class representative's service payment, and claims administration expenses	175 days after preliminary approval
11	Last day for Stream to deposit subsequent Common Fund payment of \$9,030,000 with the Claims Administrator	15 days after the Effective Date
13	Last day for claims to be submitted by Class Members	180 days after preliminary approval

14

15 **V. PRELIMINARY APPROVAL OF THE SETTLEMENT IS**  
 16 **APPROPRIATE**

17       The law favors settlement, particularly in class actions and other complex cases  
 18 where substantial resources can be conserved by avoiding the time, cost and rigors of  
 19 formal litigation. *See 4 Newberg* § 11.41 (and cases cited therein); *Van Bronkhorst v.*  
 20 *Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976).

21       Preliminary evaluation of class action settlements is intended to determine only  
 22 whether the proposed settlement is within the range of possible approval or whether it  
 23 is potentially fair, as the Court will make a final determination on adequacy at the  
 24 final approval hearing. *See Acosta v. Trans Union LLC*, 243 F.R.D. 377, 386 (C.D.  
 25 Cal. 2007); *In re Traffic Exec. Ass'n*, 627 F.2d 631, 633-34 (2d Cir. 1980); *4*  
 26 *Newberg* § 11.25.

27       The Court thus has broad powers to determine whether a proposed settlement is  
 28 fair under the circumstances of the case, *see Torrisi v. Tucson Elec. Power Co.*, 8

1 F.3d 1370, 1375 (9th Cir. 1993); *Acosta*, 243 F.R.D. at 384 (citing *Yamamoto v.*  
 2 *Omiya*, 564 F.2d 1319, 1325 (9th Cir. 1977)), and preliminary approval of a  
 3 settlement agreement should be granted unless there are reasons to doubt its fairness  
 4 or there are other “obvious deficiencies” in the proposed settlement making it clear it  
 5 would not ultimately weather a final approval hearing. *See In re Prudential*  
 6 *Securities, Inc.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995).

7 To make this fairness determination, courts consider several relevant factors,  
 8 including the strength of the plaintiffs’ case, the risk, expense, complexity and likely  
 9 duration of further litigation, the risk of maintaining class action status through trial,  
 10 the amount offered in settlement, the extent of discovery completed and the stage of  
 11 the proceedings, as well as the experience and views of counsel. *Torrissi*, 8 F.3d at  
 12 1375. This list of factors is not exclusive, however, and the court may balance and  
 13 weigh factors differently depending on the factual circumstances of each case. *See id.*  
 14 at 1376.

15 The *Manual* summarizes the preliminary approval criteria as follows:

16 “If the preliminary evaluation of the proposed settlement does not disclose  
 17 grounds to doubt its fairness or other obvious deficiencies, such as unduly  
 18 preferential treatment of class representatives or of segments of the class, or  
 19 excessive compensation for attorneys, and appears to fall within the range of possible  
 20 approval, the court should direct that notice . . . be given to the Class Members of a  
 21 formal fairness hearing, at which arguments and evidence may be presented in  
 22 support of and in opposition to the settlement.” *Manual* (Third) § 30.41; *see also* 4  
 23 *Newberg* § 11.25.

24 When examining settlement agreements, a presumption of fairness exists  
 25 where: (1) the settlement is reached through arm’s-length bargaining; (2)  
 26 investigation and discovery are sufficient to allow counsel and the court to act  
 27 intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of  
 28 objectors is small. 4 *Newberg* § 11.41.

1       Here, the proposed Settlement clearly falls well within the range of  
 2 reasonableness as the terms of the agreement are fair and adequate and provide an  
 3 excellent result for Plaintiff and Class Members, especially considering the  
 4 complexities of the case, the substantial risk inherent in non-certification, and the  
 5 risks of not prevailing on the merits at trial. Gaines Decl. at ¶¶ 16-25. Further,  
 6 Plaintiff has engaged in extensive discovery over the course of half a year, including  
 7 depositions, review of thousands of documents, and extensive written discovery. The  
 8 Parties have engaged in informed, good faith, arms-length negotiations with adequate  
 9 access to necessary information, and did so with the assistance of a highly regarded  
 10 and experienced mediator, who ultimately suggested a settlement along the lines that  
 11 the Parties' agreed upon. *See generally* Gaines Decl. at ¶¶ 11-25.

12       Both Plaintiff's counsel and Defendants' counsel are experienced in class  
 13 action matters and are capable of assessing the strengths and weaknesses of claims  
 14 and the benefits of the proposed Settlement under the circumstances of the case and  
 15 in the context of a private, consensual agreement. Plaintiff's counsel believes the  
 16 Settlement offers an exceptional result to Class Members, commensurate with the  
 17 risks of further litigation. Accordingly, preliminary approval of the Settlement is  
 18 appropriate. Gaines Decl. at ¶ 2-6, 16-24; Declaration of Daniel F. Gaines at ¶¶ 2-5;  
 19 Declaration of Scott A. Miller at ¶¶ 2-4; Declaration of Steven L. Miller at ¶¶ 2-4.

20       **A. The Terms of the Proposed Settlement Provide Reasonable  
 21 Compensation for Plaintiff's and Class Members' Damages**

22       Ultimately, a settlement should stand or fall on the adequacy of its terms. *In re*  
 23 *Corrugated Container Antitrust Litig.*, 643 F.2d 195, 211 (5th Cir. 1981).

24       This matter presents a unique factual pattern and the Settlement reflects an  
 25 excellent compromise.

26       The bases of the Class Members' claims are statutes and case law which render  
 27 the recording of telephone conversations without the consent of all parties to the  
 28 conversation tortious conduct. Gaines Decl. at ¶¶ 8, 12. The California Penal Code

1 provides for statutory damages of \$5,000 per occurrence (*California Penal Code* §  
 2 637.2). Other states have similar statutes and case law which impose similar  
 3 restrictions.<sup>2</sup>

4 Based upon the discovery completed thus far and the nature of the claims  
 5 alleged, neither Plaintiff Batmanghelich, nor any other Class Member, has suffered  
 6 actual damages as a result of the conduct alleged in the lawsuit. In fact, it is  
 7 suspected that few – if any – Class Members even realize they have been subject to  
 8 the harm alleged on their behalf. Based on this analysis, whatever Class Members  
 9 receive will be nothing short of a windfall in exchange for the release of claims which  
 10 they do not know they have. Gaines Decl. at ¶¶ 16, 25.

11 However, the purpose of the relevant laws – to discourage the surreptitious  
 12 recording of telephone calls – will be advanced by this Settlement in several ways.  
 13 The Defendants have not only changed their business practices by agreeing not to  
 14 record telephone calls in the future without full disclosure going forward (Stip. at ¶  
 15 4), but they are paying a Common Fund of \$9,480,000 to compensate Class  
 16 Members. Stip. at ¶ 1(l); Gaines Decl. at ¶ 17.

17 Defendants' defenses to certification and liability are an important basis for  
 18 validating the reasonableness of the settlement amount. Sirius and Stream have  
 19 consistently maintained that they have ample legal and factual grounds for defending  
 20 this action on both class and merits issues. Gaines Decl. at ¶¶ 18-23.

21  
 22  
 23 <sup>2</sup> California's statute is particularly harsh – statutory damages of \$5,000 per  
 24 occurrence. Some of the other states encompassed in the settlement have statutes  
 25 which provide for statutory damages or penalties of no more than \$1,000 per  
 26 occurrence, and some states require a showing of actual damages to recover. *See*,  
 27 *e.g.*, Conn. Gen. Stat. Ann. § 52-570d(a) et seq. (Connecticut); Fla. Stat. Ann. §  
 28 934.03(1) et seq. (Florida); 720 ILS 5/14-2(a) et seq. (Illinois); Md Cts. & Jud. Proc.  
 Code Ann. § 10-402(a) et seq. (Maryland); M.G.L.A. 272 § 99 et seq.  
 (Massachusetts); M.C.L.A. 750.539a et seq. (Michigan); Nev. Rev. Stat. § 200.620 et  
 seq. (Nevada); NH Rev. Stat. Ann. § 570-A:2 et seq. (New Hampshire); 18 Pa. Cons.  
 Stat. Ann. § 5703(1) et seq. (Pennsylvania); Wash. Rev. Code Ann. § 9.73.030 et seq.  
 (Washington).

1        In considering the reasonableness of this settlement, Plaintiff was keenly aware  
 2 of the doctrine of annihilating damages and its potential impact on a class  
 3 certification ruling. Several courts in the Central District of California have denied  
 4 class certification of cases when the potential damage exposure following  
 5 certification could potentially be so large that it would be “annihilating” to the  
 6 Defendant. *See Najarian v. Avis Rent a Car Sys.*, No. CV 07-0588, 2007 U.S. Dist.  
 7 LEXIS 59932 (C.D. Cal. June 13, 2007); *Najarian v. Charlotte Rousse, Inc.*, No. CV  
 8 07-0501, 2007 U.S. Dist. LEXIS 59879 (C.D. Cal. June 12, 2007); *Soualian v. Int'l  
 9 Coffee & Tea LLC*, No. CV 07-0502, 2007 US. Dist. LEXIS 44208 (C.D. Cal June  
 10 11, 2007); *Spikings v. Cost Plus Inc.*, No. CV 06-8125, 2007 U.S. Dist. LEXIS 44214  
 11 (C.D. Cal. May 25, 2007); *Legge v. Nextel Commc'ns, Inc.* No. CV 02-8676, 2004  
 12 U.S. Dist. LEXIS 30333 (C.D. Cal. June 25, 2004). Although the Ninth Circuit very  
 13 recently partially rejected the reasoning in these cases (*see Bateman v. American  
 14 Multi-Cinema, Inc.*, --- F.3d ----, 2010 WL 3733555 (9th Cir. Sept. 27, 2010)), it still  
 15 left open the possibility that the annihilating damages doctrine could bar certification.  
 16 *See Gaines Decl.* at ¶¶ 18, 21.

17        Defendants also opposed certification on other grounds, including the difficulty  
 18 of ascertaining the identity of class members without listening to each and every  
 19 telephone call. *Gaines Decl.* at ¶ 20.

20        With respect to liability on the merits, Defendants argued that even if class  
 21 certification was granted and even if Plaintiff prevailed at trial, any potential damage  
 22 award would almost certainly be reduced through the Court’s equitable powers (*see  
 23 Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95 (2006) [wherein the Supreme  
 24 Court applied its equitable powers to reduce substantial statutory damages to zero]).  
 25 *Gaines Decl.* at ¶ 21.

26        In California alone, Defendants recorded several hundred thousand telephone  
 27 conversations during the applicable class period. At \$5,000 per call, total damages  
 28 would easily reach the billions of dollars – likely more than the net worth of Sirius

1 and Stream combined. Bankrupting these companies as a result of this violation of  
 2 the law results in absurdity. *See id.*; *see also Ratner v. Chemical Bank NY Trust Co.*,  
 3 54 F.R.D. 412, 416 (S.D.N.Y. 1972); *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226,  
 4 234-35 (9th Cir. 1974) (reversing the trial court's certification of an antitrust action  
 5 involving 400,000-800,000 transactions and damages of more than \$250 million,  
 6 finding that class treatment was not superior as it would subject the defendants to  
 7 "staggering damages" disproportionate to the actual harm suffered).

8 Plaintiff, however, argued in favor of certification on numerous bases,  
 9 including the fact that the alleged violations here were secret, class members did not  
 10 know their telephone calls were being violated, and as a result, a class action was the  
 11 only possible manner by which to litigate these claims. Gaines Decl. at ¶ 19.

12 Considering the risk that the Class would not be certified and that Plaintiff  
 13 would not succeed at trial (or that a substantial judgment in the class' favor would be  
 14 reduced after trial), the present settlement represents an excellent compromise of  
 15 Plaintiff's claims. Gaines Decl. at ¶¶ 6, 22-25.

16 **B. The Settlement is the Product of Serious, Arm's-Length, Informed  
 17 Negotiations and There are no Indications Present to Doubt its  
 18 Fairness**

19 The Parties engaged in arm's-length, informed negotiations during the course  
 20 of contentious litigation in order to reach the proposed Settlement. Gaines Decl. at ¶¶  
 21 11-15.

22 The judgment of experienced counsel is also an important factor in a court's  
 23 determination that negotiations were fair and informed. Absent fraud and collusion,  
 24 the court may not only *rely* upon the judgment of experienced counsel, but should be  
 25 hesitant to "substitute its own judgment for that of counsel." *Cotton v. Hinton*, 559  
 26 F.2d 1326, 1330 (5th Cir. 1977); *see also Officers for Justice v. Civ. Serv. Comm'n of*  
 27 *San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). Furthermore, the involvement of  
 28

1 an objective, third-party neutral tends to demonstrate the presence of arm's-length  
 2 negotiations. *See Martens v. Smith Barney*, 181 F.R.D. 243, 262-63 (S.D.N.Y. 1998).

3 Class Counsel have conducted significant investigation and discovery into the  
 4 facts of this class action case, including taking depositions of the persons most  
 5 knowledgeable at Sirius and Stream in Boston and Los Angeles. Sirius and Stream  
 6 have produced thousands of pages of documents, all of which were reviewed and  
 7 analyzed in advance of settlement negotiations. Multiple sets of extensive written  
 8 discovery were exchanged as well. Gaines Decl. at ¶¶ 11-15.

9 Based on this investigation and evaluation, Plaintiff's counsel firmly believe  
 10 the Settlement, on the terms set forth in the Stipulation, is fair, reasonable, adequate,  
 11 and is in the best interest of the Settlement Class in light of all known facts and  
 12 circumstances, including the risk of significant delay, the risk the Settlement Class  
 13 will not be certified by the Court, defenses asserted by Sirius and Stream, and  
 14 numerous potential appellate issues. Preliminary approval of the Stipulation of  
 15 Settlement is appropriate. Gaines Decl. at ¶¶ 6, 16-25.

## 16 **VI. PROVISIONAL CLASS CERTIFICATION IS APPROPRIATE**

17 The Named Plaintiff may, at the preliminary approval stage, request that the  
 18 Court provisionally approve certification of the class for settlement purposes,  
 19 conditioned upon final approval of the settlement. 4 *Newberg* § 11.26 (the court's  
 20 findings "at a preliminary hearing or conference concerning a tentative settlement  
 21 proposal . . . may be set out in conditional orders granting tentative approval to the  
 22 various items.... These conditional rulings may approve a temporary settlement class,  
 23 the proposed settlement, and the class counsel's application for fees and expenses.")  
 24 Before a court evaluates a settlement under Federal Rule of Civil Procedure 23(e), it  
 25 must determine that the settlement class satisfies the requirements enumerated under  
 26 Rule 23(a) and at least one of the requirements in Rule 23(b). *Molski v. Gleich*, 318  
 27 F.3d 937, 946 (9th Cir. 2003). As discussed below, the proposed class meets all of  
 28 the requirements of certification for settlement purposes.

1       **A.   FRCP 23(a) Requirements For Class Certification Are Met**

2       Preliminary approval of the Settlement is justified because the class  
 3 certification requirements exist for the Settlement Class. Rule 23(a) provides the  
 4 factors that the Court looks to for class certification: (1) the class is so numerous that  
 5 joinder of all members is impracticable; (2) there are questions of law or fact  
 6 common to the class; (3) the claims or defenses of the representative parties are  
 7 typical of the claims or defenses of the class; and (4) the representative parties will  
 8 fairly and adequately protect the interests of the class. All four of these elements are  
 9 satisfied by the proposed class for Settlement purposes.

10       **1.   Numerosity**

11       If the class is sufficiently large that joinder of all members is impractical or that  
 12 individual joinder is impractical, the numerosity requirement is met. *See Cox v.*  
 13 *American Cast Iron Pipe*, 784 F.2d 1546, 1557 (11th Cir. 1986).

14       While the precise number of class members is unknown, retained statistics  
 15 indicate that the class contains upwards of one million members. Therefore, joinder  
 16 of individual claims would be impractical and the numerosity requirement is satisfied  
 17 for settlement purposes only. Gaines Decl. at ¶ 28.

18       **2.   Commonality**

19       The commonality requirement of Rule 23(a) is met if there are common  
 20 questions of fact and law among the class. *Hanlon*, 150 F.3d at 1019 (“The existence  
 21 of shared legal issues with divergent factual predicates is sufficient, as is a common  
 22 core of salient facts coupled with disparate legal remedies within the class”). Here,  
 23 the Settlement Class Members all seek the same remedies under identical (or similar)  
 24 state laws under the same theories of recovery, all relating to the surreptitious  
 25 recording of telephone conversations. The same factual predicates apply to each and  
 26 every Class Member. The Settlement compensates Class Members for these identical  
 27 claims. Gaines Decl. at ¶ 29. Under these circumstances, the commonality

1 requirement is satisfied for settlement purposes. *Id.* at 1019-20; *see also* Cox, 784  
 2 F.2d at 1557.

### 3. Typicality

4 The typicality requirement of Rule 23(a) is met if the claims of the Named  
 5 Plaintiff are typical of the class, though “they need not be substantially identical.”  
 6 *Hanlon*, 150 F.3d at 1020. Factual differences may exist between the class and the  
 7 Named Plaintiff, provided the claims arise from the same events or course of conduct  
 8 and are based upon the same legal theories. *Id.* Moreover, the typicality and  
 9 commonality elements of Rule 23(a) “tend to merge” because both assess whether the  
 10 claims of the class and the named plaintiffs are sufficiently interrelated to make class  
 11 treatment appropriate. *Gen. Tel. Co. of the SW v. Falcon*, 12 S.Ct. 2364, 457 U.S.  
 12 147, 157 n. 13 (1982).

13 Here, Plaintiff Batmanghelich’s claims are not only typical of those of all Class  
 14 Members – they are identical. Plaintiff alleges his telephone conversations with  
 15 Defendants were recorded without notice or consent. This is the same claim alleged  
 16 on behalf of all Class Members. Gaines Decl. at ¶ 30. Plaintiff satisfies the typicality  
 17 requirement for settlement purposes because his claims arise from the same factual  
 18 basis and are based on the same legal theories as those applicable to all Settlement  
 19 Class Members. *Welmer v. Syntex* 117 F.R.D. 641, 644 (N.D. Cal. 1987).

### 4. Adequacy of Representation

21 Rule 23(a)(4) requires that the named plaintiff and class counsel fairly and  
 22 adequately represent and protect the interests of the class. If the Named Plaintiff and  
 23 Class Counsel have no interests adverse to the interest of the proposed class members  
 24 and are committed to vigorously prosecuting the case on behalf of the class, then the  
 25 adequacy requirement is met. *Hanlon*, 150 F.3d at 1020; *see also Griffin v. Carlin*,  
 26 755 F.2d 1516 (11th Cir. 1985).

27 Here, Plaintiff Kambiz Batmanghelich has interests directly aligned with all  
 28 Class Members and has prosecuted this case on their behalf for nearly a year. He has

1 no apparent conflicts with Class Members. He has demonstrated his commitment to  
 2 prosecute this Action on their behalf through its conclusion. Gaines Decl. at ¶ 31.

3 Under the proposed Settlement, Mr. Batmanghelich will request a small service  
 4 payment – \$10,000, for his significant time and efforts assisting Class Counsel with  
 5 factual issues surrounding the case, and in exchange for his own share of the  
 6 Settlement Amount. This award represents about one-tenth of one percent of the  
 7 Common Fund, and therefore does not constitute a sufficient conflict of interest to  
 8 foreclose fulfilling the adequacy requirement. *See* Stip. at ¶ 3.6; Gaines Decl. at ¶ 35.

9 Additionally, Plaintiff's counsel are highly experienced litigators, with a  
 10 collective seven decades of litigation experience. As evidenced by the declarations of  
 11 Steven L. Miller, Scott A. Miller, Daniel F. Gaines, and Kenneth S. Gaines, filed  
 12 herewith, each has substantial experience prosecuting complex class action cases,  
 13 both in the consumer and employment contexts. As such, there is no conflict of  
 14 interest between the Named Plaintiff, proposed Class Counsel, and the Settlement  
 15 Class Members, and the adequacy element is met. Gaines Decl. at ¶¶ 2-5, 32; Daniel  
 16 F. Gaines Declaration at ¶¶ 2-5; Scott A. Miller Declaration at ¶¶ 2-4; Steven L.  
 17 Miller Declaration at ¶¶ 2-4.

18 **B. FRCP 23(b)(3) Requirements for Class Certification are Met**

19 The proposed Settlement Class also meets the requirements of Rule 23(b)(3)  
 20 for settlement purposes because: 1) common questions predominate over questions  
 21 that affect individual members; and 2) class resolution is superior to other available  
 22 methods of adjudication. When assessing predominance and superiority, the Court  
 23 may consider that the class will be certified for settlement purposes only. *Amchem*  
 24 *Prods., Inc. v. Windsor*, 521 U.S. 591, 618-620 (1997). A showing of manageability  
 25 at trial is unnecessary; the dispositive inquiry at this stage is “whether the proposed  
 26 classes are sufficiently cohesive to warrant adjudication by representation.” *Id.* at  
 27 618-20, 623; *see also Hanlon*, 150 F.3d at 1022.

## 1. Predominance

The claims of the Settlement Class here are sufficiently cohesive to warrant certification. For settlement purposes, common questions of fact and law affecting proposed Class Members in this case clearly predominate over questions that may affect individual members. In analyzing predominance, as with commonality, “[i]t is not necessary that all questions of fact or law be common, but only that some questions are common and that they predominate over individual questions.” *Cox*, 784 F.2d at 1557. The test is whether the proposed class is sufficiently cohesive to warrant adjudication by representation. Here, the proposed Settlement Class is sufficiently cohesive because all Settlement Class Members share a common nucleus of facts and potential legal remedies – the same facts and law govern their claims; this Court could try their claims in representative fashion by common evidence regarding Plaintiff’s and Class Members’ claims, and identical law applies. All of the Settlement Class Members seek damages based on the same allegations. As a result, common questions of law and fact predominate here. Gaines Decl. at ¶ 33.

## 2. Superiority

Particularly in the settlement context, class resolution is superior to other available methods for the fair and efficient adjudication of the controversy. *See Hanlon*, 150 F.3d at 1023. The superiority requirement involves a “comparative evaluation of alternative mechanisms of dispute resolution.” *Id.* At 1023. Here, as in *Hanlon*, the alternative method of resolution is individual claims for relatively small amounts of damages, proving uneconomical for potential plaintiffs because the cost of litigation dwarfs potential recovery. *Id.*

Perhaps the most persuasive argument in favor of the superiority of class treatment here is the surreptitiousness of the alleged violations by Defendants; were a class not certified, many (if not all) Class Members would not bring claims for the violations alleged, because few (if any) know their calls were recorded: Defendants' alleged unlawful conduct, by its very nature, is secret in nature. As a result, class

1 treatment is a superior method for adjudicating these claims, and a class action is the  
2 preferred method of resolution. Gaines Decl. at ¶ 34.

3 **VII. THE PROPOSED CLASS NOTICE IS APPROPRIATE**

4 **A. The Class Notice Satisfies Due Process**

5 The Class Notice, attached as Exhibit “B” to the Stipulation of Settlement and  
6 discussed more fully at Stip. at ¶ 6, is intended to apprise all Class Members of the  
7 litigation and their right to claim a share of the settlement (or opt-out of/object to it).  
8 The proposed notice meets the standards set forth in Rule 23(c)(2)(B) for classes  
9 certified under Rule 23(b)(3). Defendants understand the vast majority of Class  
10 Members are current and former Sirius customers. The notice plan is:

- 11 1. Sirius shall provide the Settlement Administrator with the most  
12 recent e-mail addresses of Identifiable Class Members in the  
13 affected states for the relevant class period. “Identifiable Class  
14 Members” are those Sirius Satellite Radio and XM Satellite Radio  
15 customers with last known addresses in the affected states who  
16 Defendants’ records show placed a call to Sirius Satellite Radio or  
17 XM Satellite Radio that was handled by Stream during the  
18 relevant class period.
- 19 2. The Settlement Administrator shall make multiple attempts to e-  
20 mail the Notice to all Identifiable Class Members for whom Sirius  
21 has an e-mail address on file, including at secondary e-mail  
22 addresses if available. For those Identifiable Class Members  
23 whose e-mail is rejected, they shall be subject to the publication  
24 notice, set forth below.
- 25 3. For Identifiable Class Members for whom Sirius has no e-mail  
26 address on file, Sirius shall provide the Settlement Administrator  
27 with their last known physical mailing address, if available. The

1 Settlement Administrator shall mail by U.S. Mail a postcard  
2 notice in the form attached to the Stipulation as Exhibit "D."

3 4. Notice shall be published three times in the U.S.A. Today  
4 newspaper for the purpose of notifying potential class members  
5 who are not Identifiable Class Members.

6 5. Claims forms may be submitted online through a website to be  
7 developed by the Settlement Administrator. The website shall  
8 also include information about the Action, including relevant  
9 documents. Upon request, Class Members may submit claims by  
10 U.S. Mail.

11 In addition, the Settlement Agreement provides specific authority to the  
12 Settlement Administrator to handle issues of deficient responses from Settlement  
13 Class Members, and skip tracing and more extensive manual searches for returned  
14 notice mailings. The Notice and Settlement administration processes are consistent  
15 with those approved by numerous state and federal courts and are, under the  
16 circumstances of this case, the best notice practicable.

17 **B. The Proposed Notice is Accurate and Informative**

18 The proposed notices provide information on the meaning and nature of the  
19 proposed settlement and Settlement Class, the terms and provisions of the Settlement,  
20 the relief the settlement will provide Settlement Class Members, the amount of  
21 proposed service payments to Named Plaintiff, the amount of attorneys' fees and  
22 costs that Class Counsel may request, and the date, time and place of the final  
23 approval hearing. The notices clearly and accurately describe the nature of the action,  
24 the definition of the Settlement Class, and the class claims. *See* Exs. "A," "B," and  
25 "D" to Stipulation. The notices also inform class members that they may enter an  
26 appearance through counsel if they so desire, indicate that the Court will exclude  
27 from the class any member who requests exclusion, and explains the binding nature  
28 of class judgment under Rule 23(c)(3). *Id.* The notice also provides class members

1 with an opportunity to file objections to the settlement as required by Rule  
2 23(e)(4)(A). *Id.*

3 Further, the notice also fulfills the requirement of neutrality in class notices.  
4 *See 2 Newberg* § 8.39. It summarizes the proceedings to date, Plaintiffs' allegations,  
5 and the terms and conditions of the Settlement, in an informative and coherent  
6 manner, in compliance with the *Manual*'s statement that "the notice should be  
7 accurate, objective, and understandable to Class Members. . . ." *Manual* (Third) at §  
8 30.211. The notice clearly states that the Settlement does not constitute an admission  
9 of liability, and recognizes that the Court has not ruled on the merits of the action. It  
10 also states that the final Settlement approval decision has yet to be made.  
11 Accordingly, the notice complies with the standards of fairness, completeness and  
12 neutrality required of a settlement class notice disseminated under authority of the  
13 Court. *See* Fed. R. Civ. P. 23(c)(2), 23(e); *2 Newberg* §§ 8.21, 8.39; *Manual* (Third)  
14 §§ 30.211, 30.212.

15 **VIII. A FINAL APPROVAL HEARING SHOULD BE SCHEDULED**

16 The last step in the settlement approval process is the formal hearing, at which  
17 the Court may hear all evidence and argument necessary to evaluate the Settlement.  
18 At that hearing, proponents of the Settlement may explain and describe its terms and  
19 conditions and offer argument in support of Settlement approval, and members of the  
20 Settlement Class, or their counsel, may be heard in support of or in opposition to the  
21 Settlement Agreement. The parties recommend that the hearing be held  
22 approximately 175 days after preliminary approval by the Court, or on or about May  
23 23, 2011, which would give the Parties sufficient time to commence the  
24 administration process and complete the notice program. At the same time, Plaintiff  
25 will file and brief his application for an award of attorneys' fees and costs, and for the  
26 Plaintiff's incentive award.

1           **IX. THE PROPOSED AMENDMENT TO THE THIRD AMENDED**  
 2           **COMPLAINT SHOULD BE PERMITTED**

3           In connection with this Settlement, the Parties have stipulated to the  
 4           amendment of the TAC, 1) amending the class definition to include residents of states  
 5           other than California which have two-party consent laws, 2) expanding the class  
 6           period, 3) adding claims for the violations alleged under the laws of these states other  
 7           than California, and 4) amending the relief sought to include that recoverable in these  
 8           states other than California.

9           Paragraph 34 of the TAC shall be amended to read as follows:

10           34. BATMANGHELICH brings this action on behalf of  
 11           himself and all others similarly situated. This suit is  
 12           properly maintainable as a class action pursuant to F.R.Civ.  
 13           P. 23(a) and (b)(1), (b)(2) and/or (b)(3). Plaintiff seeks to  
 14           represent a class (the "Class") composed of and defined as  
 15           follows:

16           All persons in California, Connecticut, Florida, Illinois,  
 17           Maryland, Massachusetts, Michigan, Nevada, New  
 18           Hampshire, Pennsylvania, Vermont, and Washington (the  
 19           "Covered States") who (1) placed one or more telephone  
 20           calls to Sirius Satellite Radio between July 13, 2006 and  
 21           November 17, 2009, spoke with a representative on behalf  
 22           of Sirius Satellite Radio, and were not provided with notice  
 23           that the call may be recorded or monitored; and/or (2)  
 24           received one or more telephone calls from Sirius Satellite  
 25           Radio between July 13, 2006 and February 1, 2010, spoke  
 26           with a representative on behalf of Sirius Satellite Radio, and  
 27           were not provided with notice that the call may be recorded  
 28           or monitored; and/or (3) placed one or more telephone calls  
 29           to XM Satellite Radio between January 25, 2009 and  
 30           November 17, 2009 to discuss music royalty fees or  
 31           cancelling their XM Satellite Radio subscription, spoke  
 32           with a representative on behalf of XM Satellite Radio, and  
 33           were not provided with notice that the call may be recorded  
 34           or monitored.

35           Paragraph 47 of the TAC shall be amended to read as follows:

36           47. The aforementioned wiretapping, bugging, and  
 37           eavesdropping equipment was used to record and/or listen  
 38           to the telephone conversations of BATMANGHELICH and  
 39           members of the Class, all in violation of *California Penal*

Code §§ 631(a), 632(a), and 632.6(a), as well as similar laws in various other states.

Paragraph (c) of the prayer for relief of the TAC is amended to read as follows:

c. Consequential damages or statutory damages pursuant to *California Penal Code* § 637.2 as well as similar statutes in various other states.

Rule 15 provides that leave to amend “shall be freely given when justice so requires.” Fed. R. Civ. P. 15(a)(2). According to the Supreme Court, “this mandate is to be heeded.” *Foman v. Davis*, 371 U.S. 178, 182 (1962). “If the underlying facts or circumstances relied upon by a Plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.” *Id.*

Accordingly, the Ninth Circuit follows a “strong policy permitting amendment,” *Fuller v. Vines*, 36 F.3d 65, 67 (9th Cir. 1994) and cautions that leave to amend should only be denied in extreme cases such as undue delay, bad faith, or dilatory motive on the part of the movant. *Johnson v. Buckley*, 356 F.3d 1067 (9th Cir. 2004).

Because the amendment sought here is for the purpose of effectuating the Settlement reached between the Parties and because it is unopposed by Defendants, Plaintiff requests the Court enter an order, filed concurrently, amending the TAC as set forth herein.

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## X. CONCLUSION

The Settlement is fair and reasonable and all of the requirements for preliminary approval are met. The Court is therefore requested to grant this motion and enter and order in the form submitted concurrently.

DATED: October 25, 2010

Respectfully submitted,

**GAINES & GAINES,  
A Professional Law Corporation**

By: /s/

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